**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| 1998 Biennial Regulatory Review - | ) | IB Docket No. 98-118 |
| Review of International Common | ) | |
| Carrier Regulations | ) | |

# REPLY COMMENTS OF CABLE AND WIRELESS

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## SUMMARY

The Commission's proposals are indeed significant steps in the right direction, considering the current state of competition in the international telecommunications environment. However, Cable & Wireless, plc ("C&W plc") and Cable & Wireless, Inc. ("CWI") (collectively referred to as "C&W") believe that the Commission should go even further in its efforts to dispose of unnecessary regulatory burdens. Specifically, C&W and many other commenters agree that blanket Section 214 authorizations should be available to wireline and wireless carriers providing service on *affiliated* routes where the foreign affiliate lacks market power, in addition to carriers providing facilities-based and resale services to unaffiliated points. The legality of blanket Section 214 authorizations is well-established. Furthermore, applications for authority to serve affiliated routes where the foreign affiliate lacks market power, like applications for authority to serve unaffiliated routes, present no public interest concerns that require prior Commission review. With a notification procedure in place, in the unlikely event that the Commission or the Executive Branch should have concerns, the Commission still retains the opportunity to address any anticompetitive issues.

C&W also supports modification of the Commission's rules so that applicants need list only shareholders with interests greater than 25 percent. The same reasons that justify the grant of blanket Section 214 authority to carriers providing service on affiliated routes where the foreign affiliate lacks market power support this proposal as well. There is no longer a need for applicants to report 10 percent shareholders in order to assure the ability of the Commission to address possible anticompetitive behavior that the Commission has already acknowledged is exceedingly remote.

The majority of commenters also agree with C&W that Section 214 authority should extend, at a minimum, to the provision of service by the authorized entity's wholly-owned subsidiaries. By the same rationale, the authority should extend among related companies that have the same ultimate ownership and foreign affiliates, since the Commission has already addressed any substantive concerns in the original Section 214 authorization.

The provision of ISR is another area in which the Commission can and should go further in streamlining regulatory requirements. In the *NPRM*, the Commission proposed that ISR requests be addressed by declaratory ruling. C&W agrees that streamlining is appropriate for ISR, and supports suggestions made in the comments that 1) carriers be allowed to engage in ISR at their own risk upon public notice of a petition for declaratory ruling that the benchmark standard has been satisfied on the relevant route, and 2) the Commission process ISR requests in accordance with its streamlined processing procedures. The resulting regulatory flexibility would bring the benefits of competition to U.S. consumers and carriers even sooner.

Finally, C&W strenuously opposes the codification of the benchmark settlement rate condition. Codification would be premature at this time because the *Benchmarks Order* establishing the condition is currently pending before the U.S. Court of Appeals and the Commission. Unless and until the *Benchmarks Order* withstands review, it would be unwise for the Commission to codify the benchmark settlement rate condition.

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# REPLY COMMENTS OF CABLE & WIRELESS

Cable & Wireless, plc ("C&W plc") and Cable & Wireless, Inc. ("CWI") (collectively referred to as "C&W") hereby respectfully submit the following Reply Comments in the above captioned proceeding.[1] In the *NPRM*, the Commission outlined several proposals intended to streamline its regulation of international common carriers. C&W, in its Comments, both commended the Commission in its efforts to lessen the regulatory burdens placed on international carriers and offered further suggestions. While remaining generally supportive of the Commission's deregulatory proposals, C&W takes this opportunity to respond to certain issues raised in the comments.

## I. BLANKET SECTION 214 AUTHORIZATIONS FOR INTERNATIONAL SERVICES SHOULD INCLUDE WIRELINE AND WIRELESS CARRIERS PROVIDING SERVICE ON *AFFILIATED* ROUTES WHEN THE FOREIGN AFFILIATE LACKS MARKET POWER.

In its Comments, C&W reiterated its longheld belief that the Commission should rely on the conditioning or revoking of authority, rather than the construction of barriers to entry, to

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[1] *In the Matter of 1998 Biennial Regulatory Review of International Common Carrier Regulations*, Notice of Proposed Rulemaking, IB Docket No. 98-118, released July 14, 1998 ("*NPRM*"). Comments were filed with the Commission on August 13, 1998.

monitor anticompetitive behavior. Accordingly, C&W supports blanket authority not only for resale and facilities-based services on unaffiliated routes, but also on affiliated routes where the carrier lacks market power, and where the foreign affiliate provides only resale or wireless services.[2] Further, C&W believes that blanket authority is appropriate on affiliated routes where the applicant has not been found to lack market power, but has demonstrably insignificant market share.

The vast majority of commenters support the Commission's proposal to grant blanket Section 214 authority for both facilities-based and resale services to unaffiliated points. Among those supporters, many recognize that the rationale with respect to unaffiliated routes similarly applies to affiliated points where the foreign carrier lacks market power; that is, as on unaffiliated routes, the carrier would be unable to leverage any foreseeable market power which could have a possible anticompetitive impact on either U.S. carriers or consumers.[3] These commenters share C&W's view that granting blanket authorizations on affiliated routes would enhance competition in the international market by facilitating entry. At the same time, the Commission would have the option of conditioning or revoking licenses after receiving notification, in the unlikely event it should have any residual concerns about possible anticompetitive behavior. As SBC observed, this approach "shifts the burden of proof to

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2 C&W agrees with Ameritech that the Commission's regulations should be "technology-neutral." Ameritech Comments at 5. Thus, if the FCC forbears from requiring Section 214 authority for wireless carriers, on the grounds that such carriers only resell international services, the Commission should apply the same regulatory treatment to those wireline carriers who only resell services on the route in question. Similarly, any decision to forbear from requiring international tariffs, as suggested by SBC, should apply equally to similarly situated wireline and wireless carriers. SBC Comments at 9-12.

3 *See, e.g.,* CompTel Comments at 3; GTE Comments at 2; SBC Comments at 4-7; Primus Comments at 2.

opponents" to demonstrate in the specific case that the foreign affiliate is able to affect adversely competition in the U.S. market.[4] Such action is appropriate in light of the fact that the vast majority of Section 214 applications submitted by carriers having a foreign affiliate on the route do not raise competitive concerns.

### A. The legality of blanket Section 214 authorizations is long-standing and well-established.

Three commenters – MCI, AT&T, and the FBI – object to the concept or implementation of blanket Section 214 authorizations for international services in some respect. The FBI opposes the Commission's proposal in its entirety, arguing that streamlining the Section 214 process as proposed is contrary to law. The FBI claims that carriers must obtain certification from the Commission and "appropriate notice [must be] served, with a statutory right-to-be-heard," before carriers can legally provide service.[5]

The issue raised in the FBI's comments concerning the necessity for the Commission to follow congressional statutory mandates was addressed and decided by the Commission more than 15 years ago. In the *Competitive Common Carrier Order*, the Commission held that, because Congress could not foresee or completely understand the developments in the telecommunications industry, the Commission "has been granted 'substantial discretion in determining both what and how it can properly regulate,'" provided that it promotes rather than frustrates the relevant statutory goals.[6] Accordingly, in that case, the Commission discarded a

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4 SBC Comments at 6.

5 FBI Comments at 5.

6 *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Second Report and Order, 91 F.C.C.2d 59 (1982), at ¶ 13, quoting *Shapiro v. U.S.*, 335 U.S. 1, 31 (1948), *Accord Lawson v. Suwannee Fruit and Steamship Co.*, 336 U.S. 198, 201 (1943) ("*Competitive Common Carrier Order*").

"mechanical application of particular Title II regulatory tools," in favor of serving the public interest by eliminating an unnecessary regulation. In eliminating the need for resellers to adhere to the entry and exit requirements of Section 214, the Commission explicitly rejected the notion – advocated by the FBI in its comments in this proceeding -- that a literal interpretation of the Act would bind the Commission to apply Section 214 in all cases.[7] The Commission expressed its view, in that context, that the application of Section 214 to carriers "without dominance in the marketplace was unnecessary to achieve" the purposes of the statute. [8]

Clearly, then, the Commission has already determined that the statutory language of Section 214 does not constitute a "'black letter' Congressional mandate."[9] Rather, the Commission has significant discretion to regulate consistent with Congress' intent. Section 161 of the Communications Act, 47 U.S.C. § 161, does not limit this discretion as the FBI suggests.[10] Section 161 directs the Commission to repeal or modify any regulation it determines to be "no longer necessary in the public interest" and thus no longer consistent with the overarching goals of the Communications Act. Congress enacted Section 161 not to limit the Commission's ability to change or abolish its rules, but to ensure that the FCC reviews its regulations on a regular basis and eliminates those made unnecessary by the evolution of competition within the industry.

C&W appreciates the FBI's concern that it be afforded a meaningful opportunity to review carrier entry into the market. However, C&W believes that the grant of blanket Section 214 authorizations in the manner proposed by the Commission will appropriately preserve the FBI's rights and interests. As discussed in the *NPRM*, carriers would still be required to notify

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7 *Id.* at ¶ 27.

8 *Id.* at ¶ 25.

9 FBI Comments at ¶ 6.

10 *Id.* at ¶ 2.

the Commission that they are providing service pursuant to a blanket authorization, and the Commission retains the right to condition or revoke an authorization if necessary to prevent anticompetitive effects.[11] As a practical matter, any transaction of major significance from a national security perspective that might result in a new carrier commencing service pursuant to a blanket Section 214 authorization is unlikely to escape the notice of the Commission or the FBI.[12] Nothing would prevent the FCC from conducting an investigation and addressing the concerns of the FBI *before* the commencement of service under these circumstances. Since the rights and interests of the FBI can be adequately addressed either before or after grant of the blanket Section 214 authorization, C&W believes that on balance the public interest weighs in favor of adopting the Commission's proposal and thereby eliminating unnecessary barriers to entry.

### B. There is no basis for denying blanket authorizations to carriers with foreign affiliates lacking market power, since there is no meaningful possibility of anticompetitive behavior on these routes.

MCI and AT&T object to the suggestion of C&W and many other commenters that the Commission grant blanket Section 214 authorizations to carriers on routes where they have foreign affiliates lacking market power. MCI contends that the foreign affiliations of an applicant can raise "unique concerns" and thus "other parties" should have an opportunity to

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11 *NPRM* at ¶ 10.

12 Moreover, as the Commission emphasized in the *Foreign Participation Order*, the Executive Branch raises national security, law enforcement, foreign policy and trade policy "only in very rare circumstances," and the scope of such concerns with respect to Section 214 authorizations is "narrow and well-defined." *In the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities,* Report and Order and Order on Reconsideration, IB Docket Nos. 97-142, 95-22, rel. November 26, 1997 at ¶ 63 ("*Foreign Participation Order*").

consider such applications before the applicant commences service.[13] AT&T would allow the grant of blanket Section 214 authorizations on routes where the Commission has found the foreign affiliate to be nondominant, but would change the affiliation standard to any foreign ownership interest greater than or equal to 10 percent.[14] Neither position has merit.

As the Commission effectively recognizes in the *NPRM*, there is no reason to require the filing and processing of Section 214 applications that do not raise public interest concerns.[15] The fundamental concern of the Commission in authorizing U.S. carriers to provide service on routes where they have foreign affiliates is the potential for the U.S. carrier and its foreign affiliate to engage in anticompetitive behavior. However, the Commission has recognized that the potential for such anticompetitive behavior is remote unless the foreign affiliate has market power in the destination market,[16] and has tailored its regulatory requirements accordingly.[17] Thus, despite MCI's assertion to the contrary, there is no policy basis for refusing to grant blanket authority to carriers whose foreign affiliates lack market power.

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13 MCI Comments at 4.

14 AT&T Comments at 8. AT&T argues that any proposal (other than its own) to grant blanket Section 214 authorizations to carriers with foreign affiliates cannot be justified by competitive circumstances as "required" by Section 161 of the Communications Act. As discussed above, Section 161 does not limit the FCC's discretion to repeal or modify its regulatory scheme. In any event, competitive circumstances clearly do justify extending blanket authority to carriers with foreign affiliates lacking market power, since such action will encourage entry and thereby promote competition in the provision of international services.

15 *See NPRM* at ¶ 7.

16 *Foreign Participation Order* at ¶ 144.

17 For example, in the *Foreign Participation Order*, the Commission modified its "No Special Concessions" rule so that it prohibits U.S. carriers from agreeing to accept special concessions only from foreign carriers that possess market power in the foreign market, and extended its streamlined processing procedures to applications that clearly demonstrate that the foreign affiliate lacks market power as defined by market share. *Id.* at ¶¶ 156, 322.

Similarly, there is no policy basis for AT&T's suggestion that the Commission deny the benefits of the blanket authorization process to carriers whose foreign ownership interest on the route is ten percent or greater. The Commission determined in its *Foreign Participation Order* that the potential for anticompetitive conduct addressed by a ten percent affiliation standard would not justify the detrimental impact such scrutiny would have on investment in U.S. carriers and the administrative burden associated with its application.[18] The FCC confirmed its finding that 25 percent – not ten percent – is the level of interest requiring review when it stated in the *NPRM* that "non-controlling investments of *25 percent or less* very rarely raise any public interest issues that require Commission scrutiny."[19]

AT&T in its comments raises the specter of a Sprint/FT/DT transaction being consummated without prior Commission review as a reason to require scrutiny of ten percent interests. This assertion is spurious to say the least. As noted previously, any transaction of major significance that might result in a new carrier commencing service pursuant to a blanket Section 214 authorization is unlikely to escape the notice and scrutiny of the Commission -- and certainly would not escape the notice of AT&T or MCI, who would undoubtedly and promptly advise the FCC of the proposed deal. Furthermore, transactions such as Sprint/FT/DT, where two foreign carriers each take a minor ownership interest in a major U.S. carrier, are few and far between. In light of these facts, clearly there is no public interest need served by restricting the availability of blanket Section 214 authorizations as AT&T proposes to the vast majority of carriers with foreign affiliations.

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18 *Foreign Participation Order* at ¶ 85.

19 *NPRM* at ¶ 39.

While the proposals of MCI and AT&T may serve the private interests of these competitors, they do not serve the interests of the public, who will benefit from the competition encouraged by the wider availability of blanket Section 214 authorizations. As such, the concerns of AT&T and MCI regarding blanket Section 214 authority should be dismissed without further consideration.

## II. SECTION 214 APPLICANTS SHOULD BE REQUIRED TO LIST ONLY SHAREHOLDERS WITH INTERESTS GREATER THAN 25 PERCENT.

In the *NPRM*, the Commission proposed to modify its rules so that applicants will be required to list only the direct and indirect shareholders with interests greater than 25 percent.[20] The adoption of this proposal would parallel the Commission's finding in the *Foreign Participation Order* that "it is no longer necessary to scrutinize investments in or by foreign carriers that do not result in affiliations – that is, non-controlling investments of 25 percent or less."[21] MCI, AT&T and WorldCom counter that the Commission should retain the requirement that applicants list all ten percent or greater shareholders.[22]

For the reasons set forth above, C&W believes that there is no need for the Commission to heed the call of MCI, AT&T and WorldCom to retain a requirement that is no longer relevant in light of the Commission's conclusion in the *Foreign Participation Order*. Simply stated, there is no reason for applicants to report every ten percent shareholder in order to assure the ability of the Commission to address the possibility of anticompetitive behavior that the Commission has already acknowledged is exceedingly remote.[23] Moreover, contrary to WorldCom's assertions,

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20 *Id.*

21 *Id.*, citing *Foreign Participation Order* at ¶¶ 330-334.

22 *See* MCI Comments at 10; AT&T Comments at 10; WorldCom Comments at 5.

23 *See, e.g., NPRM* at ¶39.

requiring carriers to list every shareholder with a ten percent or greater interest is most assuredly more work than listing only those shareholders with a 25 percent or greater interest. Thus, the Commission should adopt its proposal requiring applicants to list only the shareholders with interests greater than 25 percent.

## III. A CARRIER'S SECTION 214 AUTHORITY SHOULD EXTEND TO ITS PARENT COMPANIES AND AFFILIATES AS WELL AS TO THE CARRIER'S WHOLLY-OWNED SUBSIDIARIES.

In the *NPRM*, the Commission proposed to amend its rules so that a carrier's Section 214 authorization would allow it to provide service through its wholly owned subsidiaries.[24] This rule change would effectively allow a carrier to obtain a single authorization, pursuant to which its several subsidiaries would be authorized to provide service. C&W suggested that the rule be broadened to allow parent companies and affiliates who operate under the same corporate structure and have the same foreign carrier affiliates as the subsidiary to use the subsidiary's Section 214 authorization. The applicant would provide the orders on which it was relying in a notification letter and would receive separate authorizations from the Commission.[25]

Many other parties made the same proposal, recognizing that the same rationale that supports allowing the provision of international services through wholly-owned subsidiaries applies in the case of "sister subsidiaries."[26] As WorldCom noted, "[e]liminating the need for commonly-owned affiliates and subsidiaries to file separate Section 214 applications for the

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24 *NPRM* at ¶ 22.

25 *See* C&W Comments at 5.

26 WorldCom Comments at 3; MCI Comments at 6; GTE Comments at 5; Deutsche Telekom at ¶ 1; Iridium U.S. at 5.

same service reduces an unnecessary administrative burden on carriers and on the Commission."[27]

The only party that opposes the Commission's proposal to allow a Section 214 authorization to extend to a carrier's wholly-owned subsidiaries is the FBI. The FBI objects to the proposal on the grounds that public interest considerations such as national security and law enforcement militate against the sharing of an authorization among related companies.[28] This argument, however, ignores the fact that the Commission has already addressed any significant substantive concerns, including any national security and law enforcement issues, in acting on the application of the first carrier. While the FBI suggests that there might be circumstances in which it would "be comfortable with a particular carrier" holding Section 214 authorizations but have a "strong objection" to a license being held by that carrier's parent company or subsidiary, the FBI does not explain what those circumstances might be. Indeed, given that the ultimate corporate ownership would be the same, it is hard to imagine any hypotheticals that fit the FBI's scenario.

However, should the FBI have objections to a related company holding a license, the Commission's proposal as modified by C&W would give notice to the FBI and provide it an opportunity to voice its objections. Should the Commission find the FBI's concerns to be persuasive, the Commission could restrict or otherwise condition the separate authorization of the related company, or indeed, could revoke the authorization altogether. If the FBI were unsuccessful in convincing the Commission of the merits of its argument, the FBI could bring an action against the Commission for license revocation or conditions. Since the FBI's rights and

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27 WorldCom Comments at 3.

28 FBI Comments at 13.

interests can be protected in this fashion, there is no reason not to reduce duplicative filings and allow companies with the same ownership and foreign affiliates to provide service pursuant to a single Section 214 authorization.

## IV. THE COMMISSION SHOULD ALLOW CARRIERS TO ENGAGE IN ISR AT THEIR OWN RISK ONCE A PETITION FOR DECLARATORY RULING HAS BEEN PLACED ON PUBLIC NOTICE AND SHOULD PROCESS SUCH PETITIONS IN ACCORDANCE WITH ITS STREAMLINED PROCESSING PROCEDURES.

The Commission proposes to allow switched services over international private lines interconnected to the public switched network, otherwise known as international simple resale ("ISR"), by declaratory ruling.[29] C&W strongly supports increased regulatory flexibility in this area.[30] Primus and FaciliCom suggest that the Commission permit ISR to a WTO country upon public notice of the filing of a petition for declaratory ruling that the benchmark standard has been satisfied on the route.[31] C&W supports this proposal with the understanding that carriers who provide service via ISR upon the issuance of such a public notice do so in full acceptance of the risk that the FCC may deny the petition and require the carriers to cease the provision of service. Under these circumstances, there would be no reason to wait for the expiration of the public notice period. Authorizing ISR as of the date of public notice under these conditions would allow carriers to enter the market sooner, thereby increasing competition and exerting downward pressure on accounting rates.

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29 *NPRM* at ¶ 41.

30 C&W Comments at 6.

31 *See* Primus Comments at 6; FaciliCom Comments at 3.

C&W also agrees with WorldCom that the Commission should process the request of a carrier to approve a country for ISR service pursuant to the benchmark standard in accordance with its streamlined processing procedures.[32] The Commission and interested parties can readily determine whether the benchmark standard has been satisfied by examining public accounting rate filings and traffic data. Moreover, such streamlined procedures would facilitate rapid entry into the international marketplace and the development of ISR services.

## V. THE BENCHMARK SETTLEMENT RATE CONDITION SHOULD NOT BE CODIFIED IN THE NEW SECTION 63.22.

In the *NPRM*, the Commission proposed to codify the benchmark settlement rate condition adopted in the *Benchmarks Order* in the new Section 63.22.[33] C&W continues to oppose this proposal. The Commission's sole justification for this proposed codification – that it would "serve to clarify carriers' general obligations" – is not sufficient in light of the current uncertainty surrounding the benchmark settlement rate condition.[34] The benchmark settlement rate condition is currently under review in an appeal pending before the U.S. Court of Appeals for the District of Columbia.[35] The Court is considering, among other issues, whether the Commission exceeded its jurisdiction by adopting the condition, and whether the condition is contrary to reasoned decision-making. C&W and the numerous other petitioners and intervenors believe strongly that the Court will ultimately rule that the benchmark settlement rate condition

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32 *See* WorldCom Comments at 6.

33 *NPRM* at ¶ 37, citing *International Settlement Rates,* Report and Order, 12 FCC Rcd 19806 (1997), *recon. and appeal pending* ("*Benchmarks Order*").

34 *Id.*

35 *See Cable & Wireless PLC v. FCC*, No. 97-1612 and consolidated cases (D.C. Cir. filed June 17, 1998).

is unlawful. In fact, the Commission has voluntarily stayed part of the condition in response to a request from MCI.[36] Under these circumstances, codification of the condition is simply unwise.

Even if the Court ultimately were to rule that the benchmark settlement rate condition is lawful, the proposed codification is simply unnecessary. The rules are more than sufficiently clear with respect to the benchmark settlement rate condition. In fact, of all the parties who submitted comments in this proceeding, only MCI supported the codification, reasoning that it would indicate that the condition is a "fundamental part" of the Commission's foreign participation rules.[37] However, for the reasons discussed above and in C&W's Comments, C&W respectfully submits that this justification is insufficient. Accordingly, C&W requests that the Commission not codify the benchmark settlement rate condition in the new Section 63.22.

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36 *See In the Matter of International Settlement Rates*, Order Staying Condition, rel. March 31, 1998.

37 *See* MCI Comments at 8.

## VI. CONCLUSION

For the foregoing reasons, C&W urges the Commission to adopt the deregulatory proposals, with the modification suggested above. C&W encourages the Commission to be firm in its efforts to streamline its Rules and lessen the unnecessary burden that is currently placed on international common carriers.

Respectfully submitted,

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I hereby certify that on this 28th day of August, 1998, a copy of **Reply Comments of Cable & Wireless** was delivered by first class mail, postage prepaid to the following:

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